IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A corporation,
Petitioner,

versus

SANDRA WETZEL, and MARI ROSS, on behalf of themselves and all others similarly situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION OF AND BRIEF OF ALASKA AIRLINES, INC., ALOHA AIRLINES, INC., ALLEGHENY AIRLINES, INC., AMERICAN AIRLINES, INC., BRANIFF AIRWAYS, INCORPORATED, CONTINENTAL AIR LINES, INC., DELTA AIR LINES, INC., EASTERN AIR LINES, INC., HAWAIIAN AIRLINES, INC., HUGHES AIR CORP., d/b/a HUGHES AIRWEST, NATIONAL AIRLINES, INC., NORTH CENTRAL AIRLINES, INC., OZARK AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., PIEDMONT AIRLINES, INC., SOUTHERN AIRWAYS, INC., TEXAS INTERNATIONAL AIRLINES, INC., TRANS WORLD AIRLINES, INC., UNITED AIR LINES, INC., WESTERN AIRLINES, INC., WIEN ALASKA AIRLINES, INC., FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

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COME NOW ALASKA AIRLINES, INC., ALOHA AIRLINES, INC., ALLEGHENY AIRLINES, INC., AMERICAN AIRLINES, INC., BRANIFF AIRWAYS, INCORPORATED, CONTINENTAL AIR LINES, INC., DELTA AIR LINES, INC., EASTERN AIR LINES, INC., HAWAIIAN AIRLINES, INC., HUGHES AIR CORP., d/b/a HUGHES AIRWEST, NATIONAL AIRLINES, INC., NORTH CENTRAL AIRLINES, INC., OZARK AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., PIEDMONT AIRLINES, INC., SOUTHERN AIRWAYS, INC., TEXAS INTERNATIONAL AIRLINES, INC., TRANS WORLD AIRLINES, INC., UNITED AIR LINES, INC., WESTERN AIRLINES, INC., WIEN ALASKA AIRLINES, INC., hereinafter referred to as "*Amici* Airlines," and pursuant to Rule 42(3) of this Court, hereby respectfully move for leave to file the attached brief *amici curiae* on behalf of Petitioner, Liberty Mutual Insurance Company. Written consent to the filing of such brief has been requested of both parties and granted.

APPLICANTS' INTEREST

1. Applicants are major domestic and international U.S. airlines employing over 100,000 women in the airline industry throughout their route systems. Their employment benefit plans and costs of doing business will be dramatically affected if there is an adverse result in this case.

2. Various amici airlines have been parties defendant in litigation in lower federal courts throughout the country in cases which have raised new and important questions concerning the merits of the exclusion of pregnancy coverage from employer benefit

plans; see, for example, *Newmon v. Delta Air Lines*, 375 F. Supp. (N.D. Ga. 1973), involving inter alia, the issue presently before this court.

3. Because these airlines employ large numbers of women of child bearing age, the decision in this case could have a major impact on the future economic health of these companies, a number of which have already suffered net losses of millions of dollars in recent years. It is in the public interest that they be allowed to present their views to this Court.

QUESTIONS OF FACT AND LAW WHICH HAVE NOT BEEN AND PROBABLY WILL NOT BE ADEQUATELY PRESENTED BY THE PARTIES

Amici Airlines believe that the following questions of fact and law have not been, and there is reason to believe they will not be, adequately presented in the briefs of the parties:

1. Whether the issue is at present properly framed so as to reflect the real question before this Court, to-wit: whether under the fringe benefit plan under scrutiny, men receive an unfair advantage in compensation over women or whether fringe benefits as a whole are fairly equivalent between the sexes.

2. Whether in light of Congressional intent, as expressed in related legislation, concerning sex discrimination, such as the proposed Equal Rights Amendment, the lower court properly construed Title VII of the Civil Rights Act of 1964.

3. Whether the EEOC guidelines of April 5, 1972 concerning employment policies relating to pregnancy and childbirth are entitled to any deference since they are the product of naked administrative fiat.

4. Whether, in light of the fringe benefits analysis advanced here, the lower court properly interpreted this court's holding in *Geduldig v. Aiello*, 417 U.S. 484 (1974).

The questions of law and fact which *Amici* Airlines desire to brief are extremely relevant to the issues in this case, especially the problem created by the fact that a majority of women who go on maternity leave fail to return to work once the baby is born.

For the foregoing reasons, it is respectfully requested that this Court grant *Amici* Airlines leave to file a brief as *amici curiae*.

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SUMMARY OF ARGUMENT

Title VII requires equality in the compensation which an employer provides employees of both sexes. Total compensation is composed of wages and fringe benefits. Equality of wages is not an issue in this case. The test for determining whether equality exists in fringe benefits is whether the payments made by the employer to provide fringe benefits are *fairly equivalent* for employees of each sex. In the absence of a showing of pretextual motivation, the particular benefits provided are irrelevant to the issue of sex discrimination within the meaning of Title VII. Since equal benefits are provided for both sexes and since it

costs an employer more to provide these benefits for women, the fringe benefit programs involved in this case are hardly discriminatory against women.

Since the legislative history of Title VII's prohibition against discrimination based on sex is extremely sparce, it is necessary to examine more recent expressions of Congressional intent in the area of women's rights. In the 1970 and 1971 Congressional debates surrounding the proposed Equal Rights Amendment, it was understood that reasonable classifications based on characteristics unique to one sex would remain proper if the Amendment were ratified. Congressional proponents of the Equal Rights Amendment continually explained that laws *concerning physical characteristics unique to one sex*, such as *child-bearing*, would not be laws which discriminated on the basis of sex. It is difficult to imagine that by the last minute inclusion of sex discrimination among the prohibitions of Title VII, Congress intended to enact the sweeping change suggested here.

Much reliance has been placed, by the lower courts in this case and others, on the April 5, 1972, EEOC Guidelines concerning employment policies relating to pregnancy and child birth and "great deference" has been paid to those guidelines in earlier proceedings in this case. As is clear from the circumstances under which those guidelines were issued, they are *in fact* entitled to *no* deference whatsoever because they were issued after *no* studies or investigations, without any procedural protections or public hearings, and are the product of naked administrative fiat.

Since the proper test in a Title VII case involving fringe benefits is whether the benefits to the two sex groups are *fairly equivalent* based on the per capita costs of the plan, this Court's holding in *Geduldig v. Aiello*, 417 U.S. 484 (1974) is dispositive of the issues in this case. In *Geduldig* the California disability plan was supported by contributions from workers of both sexes. In this case, the funds spent on premiums for the disability plan are funds allocable to the cost of labor the same as are wages. The substantial increase in cost which would follow the inclusion of pregnancy would be borne by *all* workers, both male and female, in a reduction of the employee benefit dollars available. Added benefits flowing from these added costs could flow only in favor of a small group of workers who, by definition, must be women. On the other hand, the actuarial benefits derived from the exclusion of pregnancy coverage, flow to all employees. This important factor is the same one which lead this Court to hold that such a practice was not sex-based and therefore could not constitute invidious sex discrimination.

ARGUMENT

I. Title VII Does Not Require A Disability Insurance Program To Provide Coverage For Pregnancy Or Any Other Condition.

A. *Title VII Requires Equality In a Fringe Benefit Program As a Whole and Does Not Require the Inclusion of Any Particular Benefits.*

The Amici Airlines respectfully submit that the analysis of the issue in this case has focused on only

one element of a comprehensive method of compensation — wages and fringe benefits. The true issue is whether an employer's fringe benefit program taken as a whole discriminates on the basis of sex. One aspect of a fringe benefit program may be disability insurance, and pregnancy is simply one potentially compensable condition in such a program. It is impossible to determine whether the inclusion or exclusion of any particular condition in a disability program is discriminatory without examining the *entire* program.

Fringe benefits are nothing more than a form of compensation which an employer provides for employees. *Amici* submit that the correct rule, which this Court should adopt can be stated as follows:

> **So long as the payments made by an employer to provide fringe benefits are *fairly equivalent* for employees of each sex, the particular benefits provided are irrelevant to the issue of sex discrimination within the meaning of Title VII unless the exclusion or inclusion of a particular benefit is a "mere pretext" for discrimination.**

This rule is thoroughly consistent with the statute, with the congressional history in the area (including the ERA), with Fourteenth Amendment standards, and furthermore keeps the courts out of the quagmire of picking and choosing among every possible benefit which does not fall evenly on all employees. As the

record in this case shows, almost all benefits when reduced to the smallest unit are enjoyed more by one sub-group of employees than by another.

No fringe benefits are provided for male employees in this case which are not also provided for female employees. Likewise, no fringe benefits are provided for female employees which are not also provided for male employees. The simple fact of the matter is that it costs an employer substantially more on a per capita basis to provide these benefits for women than for men. Since this is a part of the total employee compensation package, women currently receive greater compensation when the benefits covered are equal under a fringe benefit plan. To require an employer to increase the disparity in compensation under the rubric of equality is nonsense. The purpose of Title VII is not to favor one class of employees over another but to require equality of treatment.

By focusing on the narrow issue of pregnancy benefits, the Court below has missed the importance of the meaning of equality in the entire area of fringe benefits. The Court of Appeals for the Third Circuit held that an employer must provide disability insurance benefits for its employees who become pregnant if the employer provides disability insurance benefits for illness or other disabilities. With appealing simplicity, the court held that since only women can become pregnant, the failure to provide disability benefits for pregnancy constitutes discrimination on the basis of sex.

It is neither the purpose of Title VII, *nor is it necessary to this Court's interpretation of the Act*, to shape the parameters of an employer's disability insurance program item by item. Some conditions will occur only in women, some only in men; some will be more prevalent in women, some more prevalent in men; and some will occur equally in both sexes. The law requires equality of treatment of employees and forbids favoring any class of employees on the basis of the impermissible classifications of race, color, religion, sex or national origin. Equality on the basis of sex under Title VII requires that an employer compensate men and women performing the same or similar jobs equally. Equality in direct compensation (wages) must not be destroyed by inequality in indirect compensation (fringe benefits).

Regardless of the structure of the particular plan, an employer disability program is built upon insurance concepts. An employer purchases or provides an insurance policy which has specified benefits for a certain cost. If new benefits are included in the plan, the cost necessarily increases. As more funds are directed into a disability program, less funds are available for wages. In essence, it is the employees who pay at least partially for any increase in benefits under a disability plan. Those employees (male and female) who do not plan, or are unable, to have children have no need for the inclusion of pregnancy benefits in their disability package. Those who do not desire these unique benefits should not be required to pay (directly or indirectly) higher premiums to subsidize the increased costs of including benefits they neither want nor need in a program *which already costs more for one sex than the other.*

If the payments made by the employer to provide benefits for male and female employees are *fairly equivalent*, then the fringe benefit program does not discriminate on the basis of sex within the meaning of Title VII. If wages are also nondiscriminatory, then the employer is compensating male and female employees equally. There is no need for further judicial scrutiny if these conditions are met.

The test proposed above is similar to that taken by the EEOC and the Courts in evaluating employment tests under Title VII. An employer is not required to establish the validity of an employment test *until* it is shown that the test has a disparate impact on a particular class of employees. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Likewise, an employer should not be required to justify the inclusion or exclusion of any particular condition until it is shown that his disability insurance program provides disparate compensation for one class over another. In the absence of a showing of pretextual motivation (of which there has been none in this case), judicial scrutiny of a fringe benefit program should end when it has been determined that the payments made by the employer to provide the insurance are fairly equivalent for each class of employee. When this standard is applied to disability insurance programs, it is clear that these programs do not discriminate against women. The simple fact is that it now costs more for an employer to provide the type of insurance involved in this case for women than it does for men, even *without* any additional benefits for pregnancy.[1]

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1 For example, actuary Paul Jackson, a Fellow in the Society of Actuaries, who has worked in the area of disability insurance coverage since 1956 testified without contradiction in *Gilbert v. General Electric Co.*, 375 F. Supp. (E.D. Va. 1974) concerning the insurance industry practice and experience with respect to disability insurance. His testimony showed that approximately 40

It is unclear from the record what portion of the benefit dollar provided by Liberty Mutual to its employees is received by females. This determination may have to be made on remand in light of the standard proposed above.

B. *The Inclusion of Pregnancy In a Disability Insurance Program Would Force the Restructuring or Abolition of Fringe Benefit Programs to Maintain the Equality That Presently Exists.*

The inclusion of pregnancy benefits in a disability insurance program is not a minor adjustment. It is a major expense in the aggregate which is not normally included in a disability policy. The annual cost of adding maternity benefits to the sickness and accident disability income plans currently in effect in the United States has been estimated at over one billion dollars.

Employers and employees have an obvious interest in maintaining the financial integrity of their disabili-

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percent of the work in the United States under age 65, or some 32,000,000 employees, is covered by sickness and accident disability insurance. The benefit periods of this insurance vary: about 45 percent of the plans provide 13 weeks benefit coverage; 50 percent provide coverage for 26 weeks; and only 5 percent provide coverage for 52 weeks. Only 40 percent of these plans, covering about 12,800,000 employees, provide a pregnancy benefit, and such coverage is almost always limited to six weeks. The cost per unit of benefit under the existing insurance plans for a female employee is approximately 170 percent of that for a male employee even where no maternity benefit is provided; where a six-weeks maternity benefit is provided, the female cost per unit of benefit runs to 210 percent of the male employee cost; and the latter percentage goes up to 300-330 percent of the male employee cost per unit of benefit where full maternity coverage is provided.

ty insurance programs. The purpose of these plans is income protection during a temporary period of disability at an affordable cost. Unlike other conditions, pregnancy often represents a permanent change in status from employee to non-employee. Between forty and fifty percent of the female employees who have children do not return to work following the birth of their child. For these employees, pregnancy does not represent an interruption in their employment but rather a change from a full-time employee to a full-time parent. To provide pregnancy benefits to employees who desire to leave their employment to raise a family would amount to a massive form of severance pay. Such a result is patently unfair to the remaining employees who are seeking income protection for temporary disabilities. It is self evident that there is no reliable way to determine which employees would return following childbirth and which would not. The point is not that some persons would abuse the program. The point is that the cost of these programs would be substantially increased to provide benefits which will accrue to a large number of non-employees. It simply is not possible for pregnancy benefits to be provided without drastically increasing the cost and affecting the purpose of existing disability insurance programs.

Because females normally receive a larger share of the benefit dollar even in disability plans which do not include pregnancy, the inclusion of pregnancy as a compensable condition would *increase the disparity in compensation between men and women*. Since Title VII proscribes sex discrimination and not merely sex

discrimination against women, it is doubtful that it will be long before male employees begin challenging such benefit programs on the ground that they result in discriminatory higher compensation of women than men. Employers will then be faced with the dilemma of having to reduce some other benefits to women or increasing the benefits paid to men.

The employer may opt to avoid the entire problem by simply abandoning its disability insurance program and increasing the wages accordingly so that employees could purchase their own disability insurance. *Title VII only requires equality. It does not require an employer to provide any fringe benefits at all — including disability insurance.* This option vividly displays the fallacy in the argument that an employer's disability insurance program must include maternity benefits:

> ***If* it is not discriminatory for an employer to have *equal wages* and no insurance program (allowing employees of either sex to purchase their own coverage), *then* it must not be discriminatory for an employer to have *equal compensation* consisting of equal wages and equal fringe benefits.**

Otherwise, an employer who provided no insurance program would have to increase the wages of female employees so that they could purchase pregnancy disability insurance. Title VII was never intended to require the anomalous result of higher wages for women than for men.

There simply is no need for this court to examine the particular benefits which employers and employees have decided to purchase as part of a fringe benefit program. Once this Court determines that the total compensation, including wages and fringe benefits, is equal for male and female employees, the requirements of Title VII have been met. The *Amici* Airlines respectfully submit that the only *workable test* for determining whether equality in fringe benefits exists, which can be clearly understood and administered fairly and easily by both employers and the courts, is a test which focuses on the payments made by the employer to purchase the benefits involved. If the payments made by an employer to provide fringe benefits are fairly equivalent for both sexes, equality exists and the requirements of Title VII have been met.

II. The Legislative History Of Title VII And The Proposed Equal Rights Amendment To The Constitution Support The View That The Failure To Include Pregnancy Benefits Here Is Not Unlawful.

As is known to this Court, the legislative history of Title VII's prohibition against discrimination based on sex is extremely sparse. The House debate on the sex discrimination amendment covers only nine pages in the Congressional Record.[2] The problem presented in this case was not anticipated during that brief debate, although one of its proponents, Congresswoman St. George, did state that women do not seek or need "special privileges" of the type sought here.[3] Senator Humphrey, manager of the pending Senate bill, commented at one point that, "differences of treatment in industrial benefit plans, including earlier retirement options for women, may continue in operation under this bill if it becomes law."[4] Certainly, these remarks strongly suggest that Congress wisely recognized that the inherent differences between men and women would justify certain distinctions which employers could make with regard to benefit plans. What Congress in effect said was that Title VII's sex discrimination provisions did not reach those particular situations where men and women were not similarly situated.

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2 110 Cong. Rec. 2577-2584 (1964). *See generally*, Note, "Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964." 1968 Duke L.J. 671.

3 110 Cong. Rec. 2581 (1964).

4 110 Cong. Rec. 13663-4 (1964).

There are some, including the EEOC, who feel that these earlier expressions of congressional intent are outmoded in light of changes in societal attitudes toward women. However, these proponents of the expansion of rights and privileges for women ignore a much more recent and explicit expression of the Congressional mind.[5] In 1970 and 1971, Congress considered the proposed Equal Rights Amendment to the Constitution ("ERA"). During the hearings and debates on the ERA, which, if adopted will overlap Title VII in many respects, much was said about the concept of sex discrimination in a situation where members of the two sexes were not *similarly situated*. For example, fourteen members of the House Committee on the Judiciary who supported the version of the ERA which was ultimately approved by both Houses of Congress stated as their Separate Views:

> ". . . the original resolution does not require that women must be treated in all respects the same as men. 'Equality' does not mean 'same.' As a result, the original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex. For example, a law providing for payment of the medical costs of child-bearing could only apply to women. In contrast, if a particular characteristic is found among members of both sexes, then under the proposed amendment it is not the sex factor but the individual

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5 The practice of looking to analagous legislative activity to glean the general legislative understanding of any given provision was sanctioned by this Court in *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973).

factor which should be determinative." H.R. Rep. No. 92-359, 92d Cong., 1st Sess. 7 (1971).

This understanding was adopted by the majority Report of the Senate Committee on the Judiciary,[6] by the authors of the ERA[7] and by various constitutional scholars and commentators.[8] Proponents of the ERA continually explained that laws concerning wet-nurses, sperm banks, *child-bearing*, forcible rape and other matters related to physical characteristics unique to one sex are not laws which discriminate on the basis of sex. Thus, a classification dealing with pregnancy in a separate manner, consistent with the general concepts set forth above, is not a scheme within the Congressional mind which discriminates on the basis of sex.

III. The Sex Discrimination Guidelines Issued By The EEOC On April 5, 1972 Concerning Employment Policies Relating To Pregnancy And Childbirth Are Not Entitled To Any Deference In The Decision Of This Case Because They Are The Product Of Naked Administrative Fiat.

The Civil Rights Act of 1964, 42 U.S.C. Section 2000e *et seq.*, went into effect on July 2, 1965. Guidelines on

6 S. Rep. No. 92-689, 92nd Cong., 1st Sess. 11 (1971).

7 Hearings on H.J. Res. 35,208 and Related Bills, and H.R. 916 and Related Bills, before Subcommittee No. 4 of the Committee on the Judiciary, House of Representatives, 92nd Cong. 1st Sess. 40 (1971).

8 *E.g.*, T. Emerson, Hearings on S.J. Res. 61, S.J. Res. 231 before Committee on Judiciary, U.S. Senate, 91st Cong., 2nd Sess. 430, n. 7 (1970).

Discrimination Because of Sex were originally issued by the EEOC on November 24, 1965;[9] they were amended first on February 21, 1968;[10] again on August 19, 1969;[11] and were last amended and revised effective April 5, 1972.[12] Prior to the last revision, the Guidelines expressed no view whatsoever with respect to the way disabilities resulting from pregnancy or childbirth were to be treated. However, in a series of opinion letters issued contemporaneously with the passage of Title VII and adherred to consistently up to 1972, the EEOC repeatedly stated its position that it was not necessary that pregnancy be included. For example, in an opinion letter issued in 1966, General Counsel Charles Duncan succinctly explained the EEOC's position on the issue:

> ". . . The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees. . . . We do not believe an employer must provide the same fringe benefits for pregnancy as he provides for illness . . ."

On the specific question before this Court as to whether pregnancy need be covered under disability insurance benefit plans, Mr. Duncan set out the

9 30 Fed. Reg. 14926.

10 33 Fed. Reg. 3344.

11 34 Fed. Reg. 13367.

12 37 Fed. Reg. 6835.

EEOC's position in another opinion letter "issued pursuant to 29 C.F.R. 1601.30":

> ". . . An insurance or other benefit plan may simply exclude maternity as a covered risk, and such an exclusion would not in our view be discriminatory." (Excerpt from an EEOC opinion Factor dated November 10, 1966.)[13]

General Counsel Opinion Letters are considered to be interpretations of Title VII by the Commission. *Williams v. New Orleans S.S. Association*, 341 F. Supp. 613, 615-616 (E.D. La. 1972). Absent more, and since the opinion letters are reasonably contemporaneous with the Act, and consistent with each other, they are entitled to "great deference" by the courts. *National Labor Relations Board v. Boeing Company*, 412 U.S. 67, 75 (1973).

Notwithstanding its prior interpretations of the Act with regard to the pregnancy benefits question, the EEOC suddenly reversed itself and issued revised guidelines on April 5, 1972. These are the guidelines which respondents here assert are entitled to "great deference." As will be shown, these guidelines are not entitled to any deference. These radically different "guidelines," which obviously will have a major economic impact on the business sector, were developed in a factual vacuum with no respect for necessary procedural safeguards and with absolutely no investigation whatsoever.

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13 Certain of the Opinion Letters issued in 1966 regarding the instant question were published in the CCH Reporting Service. *E.g.*, CCH EPG ¶ 17,304.43.

The Chief of the Legislative Council Division of the EEOC at the time these guidelines were published was Mrs. Sonia P. Fuentes, who had held that position for several years before the guidelines were issued. (See testimony of Mrs. Fuentes, attached hereto as Appendix A, pages A-1 through A-8, *infra.)* The Office of Legislative Council was responsible for drafting rules, regulations and guidelines in the area of sex discrimination and other related matters. Thus, this office was responsible for preparing the 1972 guidelines. (Page A-3)

In an early case, following the issuance of the new Guidelines, *Newmon v. Delta Air Lines, Inc.*, 374 F. Supp. 238 (N.D. Ga. 1973), where the precise issue before this court was considered, Mrs. Fuentes (as the author of the "Guidelines") was subpoenaed and testified by deposition concerning the issuance of the guidelines by the Commission. In considering what effect those guidelines were to have on the case before him, Judge Henderson concluded that they were not worthy of judicial deference because "there appears to be no factual basis upon which these regulations were drawn."[14] An examination of that testimony will show that Judge Henderson's statement was well founded.

Among other things, the testimony was that the EEOC knew of *no* medical studies concerning pregnancy which had been conducted by the EEOC prior to the issuance of the guidelines.[15] The testimony also indicated that the Commission was *not aware of any* financial studies concerning the impact of the

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14 374 F. Supp. at 245.

15 Appendix at A-3—A-8.

guidelines on industry as a whole which had been made either by it or anyone else at the time the guidelines were drafted.[16] And, in spite of the fact that the EEOC was totally *unaware* of *any relevant data* collected by it or others, the Commission held no public hearings in connection with the development of the guidelines which might have elicited helpful information. Instead of being developed under the protection of any sort of procedural due process consistent within the concepts guaranteed by the Constitution, the 1972 guidelines were composed by one person who had no expertise in the field of medicine, economics or labor relations, and who was assisted by only four other people, including two law students employed as law clerks. Thus were the guidelines for American Industry in the area of maternity leave programs developed.

The mere fact of the existence of such an administrative determination, supposedly entitled to "great deference" necessarily leads one to an examination of how the 1972 guidelines came into existence. In its prefatory remarks to the guidelines published on April 5, 1972, the Commission stated:

> "Because the material herein is interpretive in nature, the provisions of the Adminstrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rule-making, opportunity for public participation, and delay in the effective date are inapplicable." (37 Fed. Reg. 6835, 6836) (April 5, 1972)

16 Appendix at A-5—A-6.

Having dispensed with the procedural safeguards which Congress clearly intended federal agencies to use when it enacted the Administrative Procedure Act, the EEOC then proceeded to have the guidelines published in the April 5, 1972 edition of the Federal Register within the pages entitled "Rules and Regulations," in a shocking attempt to *clothe these writings with the dignity which this Court had given to earlier guidelines on job testing.*

Where did the agency get the authority to issue guidelines in such a manner? The EEOC states it was by virtue of Section 713(b) of Title VII of the Civil Rights Act of 1964, U.S.C. Section 2000e-12(b). *See* 37 Fed. Reg. 6835. Section 2000e-12 sets forth as follows:

Regulations: Conformity of Regulations

With Administrative Procedure Act: Reliance on Interpretations and Instructions of Commission

(a) The Commission shall have authority from time to time to issue, . . . suitable *procedural* regulations to carry out the provisions of the subchapter. Regulations issued under this section *shall be in conformity with the standards and limitations of the Administrative Procedures Act.*

(b) In any action or proceeding based on any alleged lawful employment practice, no person shall be subject to any liability or

> punishment for, or on account of, (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with and in reliance on *any written interpretation or opinion* of the Commission . . . [Emphasis added.]

Section 2000e-12(a) authorizes the Commission to issue procedural regulations in conformance with the APA. Since the 1972 Guidelines are clearly substantive in nature, the EEOC has no authority to make such regulations under Section 2000e-12(a).

The EEOC looks to (b) where although it has no authority to make regulations there, it finds implicit power to issue "written interpretations and opinions," which do not have the same procedural limitations attached. It is difficult to believe that Congress intended procedural regulations of the EEOC to be promulgated in a Constitutional manner, and yet not afford the same protection to *substantive* written interpretations, which obviously have a far greater impact on our society. Although it is difficult to understand why the EEOC appears eager to avoid compliance with the APA, it must, nevertheless, adopt the latter interpretation in order to avoid compliance and it has done so.

It is submitted that Congress never intended that the EEOC would promulgate substantive rules under the "written interpretation" clause of Section 2000e-12(b) and that the Commission has greatly overstepped its

authority by doing so. There is certainly a great deal of difference between guidelines interpreting a portion of the statute which requires that testing be job-related, as in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and a naked declaration that a previously approved practice is *prima facie* unlawful. In *Griggs* this Court said that the guidelines there under consideration were entitled to great deference because "the Act and its legislative history support the Commission's interpretations," a remark which the opinion carefully documented.

It is submitted that the interpretive history of Title VII supports the conclusion that the failure to include pregnancy among covered disabilities in employment disability insurance coverage does not constitute "discrimination on the basis of sex" within the meaning of Title VII. The 1972 EEOC guideline to the contrary possesses none of the *indicia* of validity, was issued after no study or hearing, is otherwise wrong, and deserves no deference whatsoever. Rather, the contemporaneous position taken by the EEOC itself prior to 1972 is a proper interpretation of the meaning of sex discrimination under Title VII as related to individualized treatment of pregnancy.

IV. The Issue In This Case Has Already Been Determined By This Court In *Geduldig v. Aiello*.

The Third Circuit Court of Appeals found that this Court's opinion in *Geduldig v. Aiello*, 417 U.S. 484 (1974), is not controlling authority with regard to the issues in this case. Both cases involve the per-

missibility of the failure to include coverage for disability from pregnancy in a sickness and accident disability plan. Although the plans were essentially the same, in *Geduldig* the manager of the plan was the State of California whereas here it is a private employer. The Court of Appeals stated it this way:

> "*Geduldig v. Aiello* involved the question of whether there was sex discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. Here we are involved with the question of whether there was discrimination in violation of Title VII of the Civil Rights Act of 1964. In this posture our case is one of statutory interpretation rather than one of constitutional analysis. On this distinction alone we believe appellant's reliance on Aiello is misplaced."

The Court of Appeals obviously felt that while situations could exist in which a state might lawfully carry on a discriminatory practice, it did not follow that a private employer could lawfully carry on the same discriminatory practice. This analysis is correct as far as it goes. *Amici* Airlines do not contest that there may be different tests under the Equal Protection Clause and Title VII to determine whether a *discriminatory* practice is lawful. *However, each test must start with a practice which discriminates on the basis of sex and* Geduldig *holds that the non-inclusion of pregnancy from the covered disabilities in an accident and sickness disability plan is not discrimination based on sex.*

If *Geduldig* had held that the practice there under scrutiny was sexually discriminatory but was justified because of some compelling governmental purpose then that case would not necessarily have any precedential value here. But such was simply not the case.

A. *In* Geduldig *this Court Held that the Exclusion of Pregnancy Related Disabilities Does Not Constitute Discrimination on the Basis of Sex.*

Though the laws governing sex discrimination in this country are different in certain major respects,[17]

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17 Charges of sex discrimination may be examined under several laws of the United States. As in *Geduldig*, the permissibility of discrimination on the basis of sex by the states is governed by the Equal Protection Clause of the 14th Amendment, while the permissibility of such discrimination on the part of the federal government is controlled by the 5th Amendment. Similarly, the extent to which private employers may discriminate on the basis of sex in hiring, compensation or wages is governed by Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963. Using these various laws as weapons, women are attacking stereotyped barriers of entry into what was heretofore a male-dominated employment market.

Some forms of discrimination on the basis of sex are legally permissable, however, and under each of the laws mentioned above, certain defenses are available to a party charged with sex discrimination. Thus, a state may show that it is not in violation of the Equal Protection Clause of the 14th Amendment when it establishes a discriminatory classification based on sex by showing that the classification had a "rational basis" or that its resulting discrimination is justified by a "compelling state interest." These same defenses are available to the federal government under the 5th Amendment. Likewise, under Title VII of the 1964 Civil Rights Act, an employer may justify discrimination on the basis of sex if it is the result of a bona fide occupational qualification or is required by overriding business necessity. An employer may also discriminate in pay between employees of different sexes provided that the system under which the pay differentials are calculated is one which measures earnings by quantity or quality of production.

under each there is a two-step analysis. The threshold question for each is the same — whether the act or practice complained of constitutes discrimination on the basis of sex. If the answer to the threshold question is in the affirmative, then the party accused may interpose a defense of justification, the type and extent of justification required being governed by the particular law under which the action is brought. If, and only if, this Court is convinced that the non-inclusion of disability resulting from pregnancy in an employee sickness and accident disability program constitutes discrimination on the basis of sex, does it then become necessary to consider whether such sex discrimination is of the unlawful variety.

B. *The Phrase "Discrimination on the Basis of Sex" Does Not Mean Something Different Under Title VII Than It Does Under the Fourteenth Amendment.*

Geduldig was decided under the Equal Protection Clause. The present action is brought under Title VII. In order to prevail here, respondents must convince this Court that the English words "discrimination on the basis of sex" mean something different when the Fourteenth Amendment is involved than they do when Title VII comes into play. They must also convince this Court that a plan which costs the same per capita for employees of both sexes, and from which women already derive greater benefits, is discriminatory *against* women. In this regard, the cases which hold that Title VII "standards" are different than Equal Protection "standards" are inapposite.

It is not here asserted that once an event of sex discrimination is found that this Court must apply the same standards for determining its permissibility under both laws. It *is* asserted *that a determination by this Court that a practice does not constitute "discrimination on the basis of sex,"* as a statement of logic, requires the application of the same logical equation to the *same practice* when the statutory proscription is against discrimination on the basis of sex. Such an equation was set forth in *Geduldig* footnote 20 to the majority opinion:

> "While it is true that only women can become pregnant, it does not follow that every legislative classification is a sex-based classification like those considered in *Reed, supra* and *Frontiero, supra* . . .
>
> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups — pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes. The physical and actuarial benefits of the program thus accrue to members of both sexes."

Therefore, unless it can be shown that the exclusion of pregnancy from covered disabilities is "pretextual," *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which showing has not here been made, the plan is lawful.

As was set forth in the initial section of this brief, a fringe benefit plan is not discriminatory in favor of one sex if the *benefits* to the two sex groups are "fairly equivalent" based on the per capita costs of the plan. Thus a decision to include or exclude a particular benefit or extend or extract coverage of disabilities by an employer does not require judicial scrutiny unless one sex derives an unfair benefit over the other.

In *Geduldig* this Court found it important that the substantial increase in cost which would accompany inclusion of normal pregnancy among the covered disabilities in the California plan would have to be borne by the non-pregnant citizens of California — both male and female. *Aiello, supra* at 265. This important factor is equally present when the plan is operated by a private employer. To assume that it would be the employer alone and not the employee-beneficiaries of the plan who would bear the staggering costs of pregnancy inclusion, omits entirely the give and take of the bargaining process and is in fact nothing more than economic *naiveté*.

Any business has a finite amount of money available for distribution to all of those with an interest in the revenue of the business. Suppliers, lenders, owners and employees all share in those funds. Premiums paid by the employer on sickness and accident policies are attributable to the employee share of revenue along with salaries, wages and other fringe benefits.

Additional funds expended on higher premiums, which would accompany the inclusion of pregnancy

benefits are funds which employees, male and female, might otherwise have received in the form of higher wages or other benefits through the process of labor contract negotiations. Those higher wages and benefits must, under Title VII, inure to employees of both sexes.

Thus, inclusion of pregnancy benefits would have a secondary effect of requiring *non-pregnant employees to bear the burden* by placing substantial funds beyond their bargaining reach. The choice of whether this should be done is most properly left up to the bargaining units as the people involved and should be subjected to judicial scrutiny, under Title VII, *only* if it appears that one sex receives an unfair advantage over the other. Judge Widener put it another way in his dissent in *Gilbert v. General Electric Co.*, 4th Cir. Ct. of App., Case No. 74-1557 (June 27, 1975):

> "And since . . . the exclusion is 'merely' the removal of 'one physical condition — pregnancy — from the list of compensable disabilities,' no reason appears why a collective bargaining agreement may not lawfully do by contract what a state may do by legislation."

In sum, the distinctions which Respondents attempt to draw between *Geduldig* and this case are *distinctions without differences*. Under the Fourteenth Amendment citizens are guaranteed equal protection under state laws. Under Title VII citizens are guaranteed equal opportunity from their employers. It is submitted that *Geduldig* was not written in a vacuum,

but with an eye to Title VII cases to come. It is consistent with the purpose of the 1964 Act — to equalize opportunity, not to create an advantage for either men or women.

CONCLUSION

For the foregoing reasons it is urged that this Court should reverse the decision of the Third Circuit Court of Appeals.

Respectfully submitted.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing has been served on Petitioner and Respondents by depositing same in the United States mail, postage prepaid, properly addressed this ____ day of July, 1975.

GORDON DEAN BOOTH, JR.

APPENDIX A

Proceedings
Taken at the Offices of the
Equal Employment Opportunity Commission
Washington, D.C. 20506

Testimony of Sonia Pressman Fuentes (Called as a witness by Delta Air Lines in the Matter of *Newmon v. Delta Air Lines*, Civil No. 15681, Northern District of Georgia, on May 31, 1973, to give a deposition concerning the drafting and promulgation of the "EEOC Guidelines on Discrimination Because of Sex", issued April 5, 1972.)

EXCERPTS FROM TRANSCRIPT
OF PROCEEDINGS

Whereupon

SONIA PRESSMAN FUENTES

was called for examination by counsel for the defendant, and having been first duly sworn, was examined and testified as follows:

Direct Examination
By Mr. Murphy:

Q. Please state your name for the record. A. My name is Sonia Pressman Fuentes.

* * * *

Q. By whom are you presently employed? A. By the Equal Employment Opportunity Commission.

* * * *

Q. What was your job with the Equal Employment Opportunity Commission? That is, commencing in 1965? A. I was a member of the General Counsel's Office.

* * * *

[12] Q. Approximately when did you become Chief of the Legislative Counsel Division? A. I gave you my best recollection. It was during the time Stanley Hebert was counsel, several years ago. I am sorry. I am not that good on time. Maybe two or three years ago.

Q. Did you continue in that position as Chief, Legislative Counsel up until this day, or have your responsibilties changed in the interim? A. No. I think commencing the first February of this year, that Division was abolished and I became an attorney in the trial litigation section.

Q. Now, do you recall meeting with me here at your office on or about May 4, 1973? A. I don't remember the date, but I did meet you.

Q. And at that time can you recall me asking you several questions concerning the development of the Equal Employment Opportunity Commission

Guidelines which [14] are contained in Section 1604.10. I guess it is of the Commission's Regulations and Guidelines . . . In fact, is this a copy of the Guidelines on Discrimination Because of Sex of the Equal Employment Opportunity Commission? A. It appears to be. It is. I don't know whether it is complete or not. They are published in the Code of Federal Regulations. I don't know whether this is complete. These are certainly some of the documents.

Q. I refer you specifically to the last page on the document and I refer you to specifically Section 1604.10 and I ask you if those are the . . . Guidelines with regard to Pregnancy and Childbirth which we discussed during my visit on May 4, 1973? A. Well, they are the Guidelines on Pregnancy and Childbirth. They are so entitled.

Q. At the time of my discussion with you in early May, can you recall me asking you if you participated in the development of these Guidelines with other attorneys [15] here of the Equal Employment Opportunity Commission? A. I recall that I said I was one of many Commission personnel who had participated in the formulation of the Guidelines.

Q. Can you recall me asking you at that time whether you knew of any medical studies which had been made in conjunction with the development of those Guidelines? A. As I recall, *I think you asked me whether the EEOC had conducted any medical studies and I think I recall saying to my knowledge it had not*. I think I also recall stating that there had been medical testimony, considerable medical testimony

presented in Court cases which involved allegations of discrimination in connection with Employer policies in the pregnancy area and I cited such court cases to you. I am trying to think of the name of it now. There was one case where there was considerable medical testimony pointing out that a woman can safely work when she is pregnant, and so on. *To my knowledge, EEOC had not itself made such studies.*

[17] Q. Can you recall me asking you at our conversation in early May whether or not the EEOC to your knowledge had conducted any studies with regard to the financial impact of the pregnancy and maternity leave guidelines? A. Well, [18] if there was such a study, since it was not made public, whether or not it was made would be a matter available to the general public; therefore I could not testify about it.

[19] Q. To refresh your memory, can you recall us discussing in early May a study about the financial impact of the Commission's Guidelines which had been made by a Bank [20] in the Boston area? A. I am trying to think. I think I have seen some write up but I don't recollect where, in a publication put out by Prentice-Hall. Prentice-Hall put out a study on leave policies in connection with maternity leave policies. *It might have contained some information on the cost.* There might also have been some information on that in a speech Jacqueline Gutwillig gave. She gave a speech in this area which has just been published. That might have contained some facts on cost. *I am just not sure.*

[21] Q. Are you aware of any studies which any one might have made with regard to the job performance of pregnant women which based upon studies of work output in relation to other women in the work force? A. *The only information I have seen, or testimony or position, are in court cases.* As I recall, the testimony indicated that by and large pregnant women could perform as well as anyone else except in jobs requiring standing where the woman involved had difficulty with swelling of the feet or ankles.

[22] Q. Do you recall or do you know of any studies which have been made by anyone with regard to the psychiatric disorders which occur in pregnancy, including phobias, depression, psychoses, and emotional instability of pregnant women as it affect their job performance? A. This is the first time in my life that I have heard there are such things associated with pregnancy . . .

Q. Can you recall having seen any studies having to do with the percentage of the female population with enters labor prematurely? A. No.

Q. Do you recall or are you aware of any studies which have concerned the phenomenon of a histal hernia occurring in pregnant women? A. That is the first time I have heard that is related to pregnancy, if it is.

Q. Have you ever seen or are you aware of any studies concerning urological problems of pregnancy as related to working women and the impact of frequent urination on job performance? A. I have seen no such study.

Q. Have you seen or are you aware of any studies with regard to the physical phenomenon of pregnancy, phenomena of pregnancy as they are related to job performance? A. That is a difficult question. With regard to studies, *I don't think so.*

Q. Are you aware of any hearings which were held, public hearings which were held in connection with the development of the Equal Employment Opportunity Commission's Guidelines on Employment Policies relating to pregnancy and childbirth? A. *No.*

[24] Q. Now, is it not true that the Equal Employment Opportunity Commission's position with regard to pregnancy and childbirth has changed since the effective date of the Civil Rights Act of 1964, which was July 2, 1965. A. Prior to the publication of these Guidelines on April 5, 1972, the Commission had no Guidelines on the matter of pregnancy and childbirth. There had been several Commission decisions in that area and the General Counsel's office had written some letters on that subject, but there had been no commission's position expressed in Guideline form until April 5, 1972.

[28] Q. Basically, do you recall my calling you up and telling you that I had a number of clients who were interested in the Commission's guidelines on discrimination because of sex, and that you said that there was another [29] woman, or man, I can't remember, another person who was primarily responsible in that area: at the present time, due to a change in positions, that you had with the Commission

several months before. A. I recall, I don't recall you saying that you had a number of clients who were interested. I got the impression from our conversation, of course it was a month ago, that you said you had some clients that were interested. There was a question in this area, that you wanted to come up with them, that somebody had given you my name. I can't recall exactly what I said. I think I would have said, *in the past my jurisdiction included the formulation of guidelines on behalf of the Commission*, but that was no longer within my jurisdiction and I believe I referred you to Issie Jenkins, a woman who was in charge of the office of legal counsel, who had that area within her jurisdiction. I think I might have mentioned she was out on leave in connection with the forthcoming birth of a child, and a man named John Goins was acting in her place . . .

* * * *

[46] Cross-Examination
By Mrs. Rindskopf:

Q. Do you know of any published studies indicating the incidence of premature birth in pregnant women? A. Do I know of any? What do you mean, "Do I know of any?" Do you mean, have I heard there have been any?

Q. Have you read or been informed of the results of any? A. To the best of my recollection, I have not read any such studies.

Q. I think I am correct if I stated that you were not aware of the problem of hiatal hernia in pregnancy? A. That is correct.

* * * *

Q. While you were functioning as Chief of the Office of Legislative Counsel . . . You enumerated a number of areas for which you had responsibility. One of the areas you stated was the drafting of rules, regulations and guidelines. Now, the guidelines to which you refer are those that are published from time to time in the Code of Federal Regulations, is that correct? A. They were published in the Federal Register. I think some of them find their way into the Code of Regulations.

Q. Will you describe the rules to which you referred: How do they differ from the guidelines? A. *I don't know that they do* . . .

Q. Was the first Guidelines, Sex Discrimination as it related to Pregnancy Leaves, issued on April 5, 1972? A. That is correct.

Q. Prior to that time there have been no Guidelines on that subject? A. No guideline rule or regulation, that is correct, although there have been Commission Guidelines on Sex Discrimination and on other subjects, published since 1965 or 1966 . . .

[59] Q. Has anything ever been published in the Federal Register that has not had the prior approval of both the General Counsel and the Commission? A. I don't know.

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Cable: Maestro

July 23, 1975

Howard A. Specter, Esq.
Litman, Litman, Harris & Specter, P.A.
1320 Grant Building
Pittsburgh, Pennsylvania 15219

Re: Sandra Wetzel and Mari Ross vs.
Liberty Mutual Insurance Company

Dear Mr. Specter:

As I informed you by telephone today, we have been requested to file an Amicus Curiae brief in the above-referenced case on behalf of the following parties:

Alaska Airlines, Inc.
Aloha Airlines, Inc.
Allegheny Airlines, Inc.
American Airlines, Inc.
Braniff Airways, Incorporated
Eastern Air Lines, Inc.
Flying Tiger Lines, Inc.
Frontier Airlines, Inc.
Hawaiian Airlines, Inc.
Hughes Airwest
National Airlines, Inc.

North Central Airlines, Inc.
Northwest Airlines, Inc.
Ozark Airlines, Inc.
Pan American World Airways, Inc.
Piedmont Airlines, Inc.
Southern Airways, Inc.
Texas International Airlines, Inc.
Trans World Airlines, Inc.
United Air Lines, Inc.
Western Airlines, Inc.
Wien Alaska Airlines, Inc.

It is my understanding that you will consent to our filing of this brief provided that you receive a copy of same by July 31, 1975.

In accordance with the Supreme Court Rules, we need your written consent to file this brief on behalf of the above-listed parties as soon as possible. We will provide you with a copy of this brief prior to the July 31st.

Thank you very much for your cooperation in this matter.

Very truly yours,
/s/ WILLIAM H. BOICE
William H. Boice

WHB:mu

Consented to by:
/s/ HOWARD A. SPECTER
Howard A. Specter
Attorney for Respondents
July 24, 1975

LEDERER, FOX AND GROVE
Attorneys at Law
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233 South Wacker Drive
Chicago, Illinois 60606
Area Code 312
Telephone 876-0500

July 22, 1975

Dean Booth, Esq.
Troutman, Sanders, Lockerman & Ashmore
Candler Building
Atlanta, Georgia 30303

Re: *Liberty Mutual Insurance Company v. Wetzel and Ross, et al*

Dear Mr. Booth:

Liberty Mutual Insurance Company consents to the filing of a brief amicus curiae in the above captioned matter on behalf of the members of the Air Transport Association, as follows:

Alaska Airlines, Inc.
Aloha Airlines, Inc.
Allegheny Airlines, Inc.
American Airlines, Inc.
Braniff Airways, Incorporated
Continental Air Lines, Inc.
Delta Airlines, Inc.
Eastern Airlines, Inc.

Flying Tiger Lines, Inc.
Frontier Airlines, Inc.
Hawaiian Airlines, Inc.
Hughes Airwest
National Airlines, Inc.
North Central Airlines, Inc.
Northwest Airlines, Inc.
Ozark Airlines, Inc.
Pan American World Airways, Inc.
Piedmont Airlines, Inc.
Southern Airways, Inc.
Texas International Airlines, Inc.
Trans World Airlines, Inc.
United Airlines, Inc.
Western Airlines, Inc.
Wien Alaska Airlines, Inc.

Very truly yours,
/s/ KALVIN M. GROVE
Kalvin M. Grove
for Lederer, Fox
and Grove

ek